SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. [redacted] 112

W. E. FLOYD, MRS. J. A. WINANS, Independent Executrix of the Estate of J. E. Winans, deceased, and for herself and as next friend for Norma Mae Winans, a minor, Mary Sue Winans Wharton, joined by her husband W. W. Wharton, Mildred Louise Miller, joined by her husband, James Miller.

Petitioners

vs.

J. T. EGGLESTON, I. N. BURNETT, C. E. DEATON, ABE KAUFMAN, CHARLES ANDERSON and wife MATTIE ANDERSON, VIRGIE BANKS and husband, C. C. BANKS, Charles ANDERSON and C. C. BANKS as administrators of the Estate of U. S. Jones, Deceased, D. G. Pepper and wife Margaret E. Pepper, Continental State Bank of Big Sandy, Texas, Amerada Petroleum Corporation, and Stanolind Pipe Line Company.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 8th SUPREME JUDICIAL DISTRICT OF TEXAS AT EL PASO.

CRAMPTON HARRIS,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No.

W. E. FLOYD, et al,

Petitioners,

vs.

J. T. EGGLESTON, et al.

PETITION FOR WRIT OF CERTIORARI

May it Please the Court:

Now come W. E. Floyd, Mrs. J. A. Winans, Independent executrix of the estate of J. E. Winans, deceased, and for herself and as next friend for Norma Mae Winans, a minor, Mary Sue Winans Wharton, joined by her husband, W. W. Wharton, Mildred Louise Miller, joined by her husband, James Miller, and petition this Honorable Court for a writ of certiorari to the Court of Civil Appeals of Texas at El Paso and in support of said petition respectfully show the following:

A.

Summary Statement of Matter Involved

1. The facts underlying this case are set forth in an opinion dated March 23, 1938 of the Commission of Ap-

peals of Texas, Section B, which opinion was adopted by the Supreme Court of Texas, appearing in 114 S. W. (2d) pages 530-533:

> "On March 19, 1932, after trial with a jury, judgment was rendered in a cause pending in the district court of Gregg county for the One Hundred Twenty-Fourth judicial district in favor of Continental State Bank of Big Sandy, plaintiff, and Amerada Petroleum Corporation, intervener, against D. G. Pepper and wife, Margaret E. Pepper, J. T. Eggleston, U. S. Joines, Charles Anderson, and Abe Kaufman, defendants, and W. E. Floyd and J. E. Winans, interveners, for the title and possession of a tract of 100 acres of land in Gregg county and canceling and holding for naught all claims to the land asserted by the defendants and the interveners, Floyd and Winans. The two interveners last named filed a motion for new trial, which was overruled, but did not appeal. On the as it denied recovery to the appellants Eggleston, Joines, Anderson and Kaufman, the Court of Civil Appeals reversed the trial court's judgment in so far as it denied recovery to the appellant's Eggleston, Joines, Anderson, and Kaufman, and rendered judgment in their favor for the mineral interests claimed by them. Pepper v. Continental State Bank of Big Sandy, 60 S.W. 2nd 1089. The judgment of the Court of Civil Appeals was reversed and that of the trial court was affirmed by this court on June 16, 1937. 106 S.W. 2nd 654.
>
> "The principal issue in the case was as to the validity of a trustee's sale of the land made April 3, 1928, to Continental State Bank of Big Sandy at a time when the title, subject to the lien, was in Pepper and wife. Two attacks, among others, made by Pepper and wife, and those holding under them, upon the title of Continental State Bank as purchaser at the trustee's sale were: First, that the sale was invalid for failure to comply with certain formalities; and second, that the

bank prior to the trustee's sale agreed with Pepper and wife that the sale was to be made, not for the purpose of divesting title, but solely to satisfy a bank examiner with respect to the note, and that thereafter Pepper and wife should retain the land or reacquire title by continuing to make payments to the bank of the amounts due on the note. *The jury in answer to special issues found that it was not agreed that the sale would be a mere formality for the purpose of satisfying a bank examiner, and that it was agreed that Pepper might reacquire the land by payment of the amount of money due the bank. It further found that Pepper did not make the payments to the bank and that after the trustee's sale he moved off the land and abandoned the intention of making the payments.* The trial court's judgment sustained the validity of the trustee's sale and the bank's unqualified ownership of the land thereunder. That judgment, as has been said, was affirmed by this court. (Emphasis supplied).

"Secondary issues arose out of a controversy between Eggleston, Joines, Anderson and Kaufman, on the one hand, and Floyd and Winans, on the other, as to the ownership under Pepper and wife of the oil, gas, and other mineral rights in the land. Eggleston and his associates claimed under an oil and gas lease and a mineral deed executed by Pepper and wife on March 16 and March 27, 1931. Floyd and Winans claimed under written contract executed August 4, 1931, by which Pepper and wife agreed to lease the land to them for oil and gas and to transfer to them an undivided one-half interest in the oil, gas, and other minerals. Allegations were made that Eggleston perpetrated a fraud upon Pepper in procuring the execution of the oil and gas lease and mineral deed under which he, Joines, Anderson and Kaufman, claimed, and that Floyd and Winans by means of fraudulent representations induced Pepper and wife to execute the contract in their favor for the mineral rights. *The jury's verdict on these secondary issues was favorable to Eggleston and his as-*

sociates and unfavorable to Floyd and Winans." (Emphasis supplied).

The case to which this opinion refers was known as Case number 7709 in the District Court of Gregg County for the One Hundred and Twenty-Fourth Judicial District. That case traveled through the Court of Civil Appeals of Texas (60 S.W. 2nd 1089), to the Supreme Court of Texas (106 S.W. 2nd 654) where the judgment of the trial court was affirmed.

2. Thereafter several bills of review were filed by your petitioners in the District Court of Gregg County, Texas, seeking to set aside the judgment in the original case on the grounds of perjury and intimidation of witnesses. As a result of these several bills of review an original proceeding was instituted in the Supreme Court of Texas by the Continental State Bank of Big Sandy, Texas and others against your petitioners, seeking a writ of prohibition prohibiting your petitioners from further proceeding with their several bills of review. The writ of prohibition was granted by the Supreme Court of Texas, (114 S.W. 2nd 530) restraining your petitioners from further proceeding with their several bills of review "and from further interference with or hindrance of the judgment of this court entered on January 16, 1937 in *Continental State Bank of Big Sandy, et al vs. D. G. Pepper, et al,* 106 S.W. 2nd 654".

3. The opinion of the Supreme Court of Texas granting the petition for the writ of prohibition was rendered on or about March 23, 1938. On April 7, 1938 your petitioners filed a motion for rehearing. This motion was overruled on April 27, 1938. On April 21, 1938, one week before the motion for rehearing was overruled, your petitioners discovered for the first time that in the original trial of the case of *Continental State Bank of Big Sandy, Texas vs.*

Pepper two of the jurors trying said case were bribed by the Continental State Bank of Big Sandy, Texas or their agents to render a verdict in favor of the said Continental State Bank of Big Sandy, Texas.

4. On June 23, 1938 your petitioners filed a new bill of review in the One Hundred and Twenty-Fourth District Court of Gregg County, Texas to set aside the verdict rendered by the said bribed jury. Your petitioners alleged, for the first time, and stood ready to prove the bribery of the two jurors by the Continental State Bank of Big Sandy, Texas or its agents. (R. p. ——).

5. In August 1938 Continental State Bank of Big Sandy, Texas and Amerada Petroleum Corporation filed a motion to dismiss in said cause, setting up as grounds therefor that the prosecution and trial of this cause would be in direct conflict with and disobedience of the aforesaid writ of prohibition and that your petitioners had been guilty of laches in not presenting their charges of bribery earlier. (R. p——) The motion was heard on the 9th day of September, 1938 and the trial court dismissed the bill of review, holding that it was in conflict with the writ of prohibition but declining to hold that your petitioners had been guilty of any laches in setting up the allegations of bribery as a ground for setting aside the aforesaid judgment. (R. p——)

6. Your petitioners appealed to the Court of Civil Appeals of Texarkana, Texas and the case was transferred to the Court of Civil Appeals for the Eighth Supreme Judicial District at El Paso, Texas, which court, on the 12th day of October, 1939, affirmed the judgment of the trial court. This opinion is reported in 137 S.W. (2nd) page 182. That court held that "an injunctive writ issued by the Supreme Court, not void must

be obeyed according to its terms until and unless modified or vacated by that court". The court further held that your petitioners had failed to prosecute their bill of review with diligence in as much as the bribery was discovered before your petitioners' motion for rehearing in the prohibition case was overruled.

7. Your petitioners thereafter filed a motion for rehearing in the cause which was overruled. (R. p. ____). Your petitioners then applied to the Supreme Court of Texas for a writ of error which was denied. (R. p____)

B.

Statement as to Jurisdiction

1. This court has jurisdiction to grant the relief prayed, because your petitioners have been denied an opportunity to prove the bribery alleged, in violation of the due process clause of the 14th Amendment to the Constitution of the United States. The decision of the highest court of Texas in which a decision could be had denied to your petitioners their fundamental right to be heard.

2. The Act of Congress of February 13, 1935, Section 237-B, 28 U.S.C.A. 344 (b), page 205, gives jurisdiction to this court "to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or prepared by the highest court of a state in which a decision could be had****where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution****** of the United States;"

3. The judgment which petitioners pray this court to review was rendered by the Court of Civil Appeals of Texas at El Paso on October 12, 1939. That court denied your petitioners' motion for rehearing in this cause on November 9, 1939. The Supreme Court of Texas denied your petitioners' application for a writ of error on January 3, 1940. On March 30, 1940, Mr. Justice William O. Douglas, by appropriate order, extended the time for filing of this petition until the expiration of a period of sixty days from March 30, 1940.

4. In this case it is contended by your petitioners: first, that the trial by a bribed jury in the proceeding which this case seeks to set aside was no trial at all and is void; and second, that the writ of prohibition heretofore referred to which was based upon bills of review not alleging the said bribery has no operation and effect on subsequent proceedings setting up said bribery; that although your petitioners stand ready to prove the said bribery they have not been accorded an opportunity so to do; and that the decision of the Court of Civil Appeals at El Paso applying the said writ of prohibition to this cause was arbitrary and unreasonable and constitutes a denial of due process in contravention of rights guaranteed to your petitioners under the 14th Amendment to the Constitution of the United States.

The question of denial of due process in inherent in this cause. It was raised by your petitioners, though not in so many words, from start to finish of this proceeding by their protestations against the fundamental injustice of allowing the said writ of prohibition to extend beyond the matters on which it was based. Indeed, it would have been difficult not to raise the question in this proceeding.

The Question Presented

The sole question here presented is whether or not the extension of said writ of prohibition beyond the allegations of the several bills of review, on which it was based, to the present bill of review, which sets up the ground of bribery (never theretofore alleged), is a denial of due process in contravention of the 14th Amendment to the Constitution of the United States, in arbitrarily and unreasonably denying to your petitioners the right to prove the said bribery and overthrow a judgment which will deprive them of several millions of dollars.

Reasons Relied on for Allowance of Writ

The Court of Civil Appeals of Texas at El Paso has decided a Federal question of substance not heretofore determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court. *Supreme Court Rule* 38, *Section* 5 *a.*

A copy of the entire record of this case, as certified to be true and correct, by the Clerk of the Court of Civil Appeals of Texas at El Paso, is hereby furnished, attached to, and made a part of this application in compliance with *Rule* 38, *Paragraph* 1, of the Rules of this Court.

WHEREFORE your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas at El Paso, commanding that court to certify and send to this Court for review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled, Number 3862, *W. E.*

Floyd, et al, vs. J. T. Eggleston, et al, and that the judgment of the said court of Civil Appeals at El Paso may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may seem meet and just; and your petitioners will ever pray.

W. E. FLOYD, MRS. J. A. WINANS, Independent executrix of the estate of J. E. WINANS, deceased, and for herself and as next friend for NORMA MAE WINANS, a minor, MARY SUE WINANS WHARTON, joined by her husband, W. W. WHARTON, MILDRED LOUISE MILLER, joined by her husband, JAMES MILLER.

By CRAMPTON HARRIS,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

W. E. FLOYD, et al,

Petitioners.

vs.

J. T. EGGLESTON, et al.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

The Opinions of the Courts Below

The opinion of the Court of Civil Appeals of Texas for the 8th Supreme Judicial District of Texas at El Paso is reported at 137 S.W. 2nd 182. Writ of error was denied by the Supreme Court of Texas January 3, 1940. (See appendix of this petition).

II.

Jurisdiction

1. The statutory provision in Judicial Code, Section 237-B as amended by the Acts February 13, 1925, 28 U.S. C.A. Section 344 (B) page 206.

2. The date of the judgment of the Court of Civil Appeals of Texas at El Paso is October 12, 1939. Writ of

error was denied by the Supreme Court of Texas on January 3, 1940. Mr. Justice William O. Douglas by appropriate order extended the time for filing this petition for a period of sixty days from March 30, 1940.

3. The nature of the case brings this proceeding within the jurisdictional provisions of Section 237-B, supra. Claim of Federal constitutional right was raised in the original trial in the One Hundred and Twenty-Fourth District Court of Gregg County, Texas. A denial of due process in violation of the 14th Amendment to the Constitution of the United States is inherent in the case though not specifically pleaded.

Your petitioners claim that the entire proceedings in this case are unconstitutional in denying to them due process of law under the 14th Amendment. This claim is grounded upon the contention that your petitioners, by reason of a bribed jury in the original cause and the subsequent refusal of the judiciary of the State of Texas to allow them to prove such bribery, have been denied their Constitutional right to their day in court and have been deprived of their property without due process of law.

4. The following cases, among others, sustain the jurisdiction:

Tumey v. Ohio, 273, U.S. 510, 523;
Ex parte Baer (*D.C.E.D. Ky.*) 20 Fed. 2nd 912;
Truax v. Corrigan, 257 U.S. 312, 332.

III.

Statement of the Case

On March 19, 1932, after a trial by a jury bribed by the Continental State Bank of Big Sandy, Texas, a judgment was rendered in cause number 7709 in the District Court of Gregg County, Texas for the 124th Judicial District in favor of the said Continental State Bank of Big Sandy and against your petitioners. Your petitioners did not know of this bribery until the 21st day of April, 1938. The case was appealed to the Court of Civil Appeals of Texas at Texarkana. The opinion of that court is styled *Pepper, et al v. Continental State Bank of Big Sandy* and appears in 60 S.W. 2nd at page 1089. That court reversed and rendered a judgment in favor of parties other than your petitioners. A writ of error was sued out to the Supreme Court of Texas, which reversed the judgment of the Court of Civil Appeals and affirmed the judgment of the lower court, 106 S.W. 2nd 654. An examination of the decision will reveal that it is founded upon findings of fact by the jury.

Thereafter, several bills of review were filed by your petitioners in the District Court of Gregg County, Texas and other courts seeking to set aside the judgment in the original case on the grounds of perjury and intimidation of witnesses. As a result of these several bills of review an original proceeding was instituted in the Supreme Court of Texas by the Continental State Bank of Big Sandy and others against your petitioners, seeking a writ of prohibition to prevent your petitioners from further proceeding with their several bills of review. The writ of prohibition was granted by the Supreme Court of Texas (114 S.W. 2nd 530) restraining your petitioners from further proceeding with those specific bills of review and

"from further interference with or hindrance of the judgment of this court entered on January 16, 1937 in Continental State Bank of Big Sandy, et al v. Pepper, et al, 106 S.W. 2nd 654."

The writ of prohibition was issued on March 23, 1938. On April 7, 1938 your petitioners filed a motion for rehearing. The motion was overruled on April 27, 1938. On April 21, 1938, one week before the motion for rehearing was overruled, your petitioners discovered that in the original trial two of the jurors trying said case had been bribed by the Continental State Bank of Big Sandy, Texas.

On June 23, 1938 your petitioners filed a new bill of review in the One Hundred and Twenty-fourth District Court of Gregg County, Texas to set aside the judgment rendered on the verdict of the bribed jury. Your petitioners alleged and stood ready to prove the bribery of the two jurors by the Continental State Bank of Big Sandy or its agents. (R. p___)

The Continental State Bank of Big Sandy and the Amerada Petroleum Corporation, which holds through said Bank, filed a motion to dismiss said cause, setting up as ground therefor, that the prosecution and trial would be in direct conflict and disobedience of the aforesaid writ of prohibition and that your petitioners had been guilty of laches in not presenting their charges of bribery earlier. (R. p___) The trial court sustained the motion holding that the bill of review was in conflict with the writ of prohibition but declining to hold that your petitioners had been guilty of any laches in setting up the charges of bribery as grounds for setting aside the aforesaid judgment. (R. p. ____). Your petitioners appealed to the Court of Civil Appeals at Texarkana, Texas and the

case was transferred to the Court of Civil Appeals at El Paso, which court affirmed the judgment of the trial court, (137 S.W.(2nd) 182). The court held that:

> "An injunctive writ issued by the Supreme Court, not void, must be obeyed according to its terms until and unless modified or vacated by that court."

The court further held that your petitioners had failed to prosecute their bill of review with diligence inasmuch as the bribery was discovered one week before your petitioners' motion for rehearing in the prohibition case was overruled, and that the charges of bribery should have been presented in that case. (R. p....)

The original suit deprived your petitioners of an oil and gas lease on land situated in the heart of the East Texas oil district, of a present potential value in excess of six million dollars. Your petitioners have never had a trial or an opportunity to present their contentions to a fair and impartial tribunal.

IV.

Errors Assigned

1. That the courts of the State of Texas deprived your petitioners of the protection of the due-process clause of the 14th Amendment to the Constitution of the United States by denying to them their day in court and by depriving them of their property without any judicial determination of their rights whatsoever.

Argument

Your petitioners present this, their petition for a writ of certiorari, with a conscious assurance that justice will not be forever denied them. That to condemn without a hearing violates the due-process clause of the 14th Amendment needs nothing but statement. Your petitioners believe that the proceedings in this matter from the original suit to the present time, founded as they all are upon the verdict of a bribed jury, are void and without effect legally or morally.

This Court, speaking through Mr. Chief Justice Taft, in the case of *Truax v. Corrigan*, (257 U.S. 312 at 332) said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado v. California*, 110 U.S. 516, 535."

Mr. Chief Justice Taft again, in *Tumey v. Ohio*, 273 U.S. 510 at 523, in speaking of a trial by a prejudiced judge said:

> "But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

If it can be said that a trial by a judge who has a pecuniary interest in a case is a denial of due process, then ***a fortiori*** a trial by a bribed jury, which renders a verdict in

favor of the party who bribed it, is a denial of those fundamental principles of right and justice which constitute the foundation on which our judicial system is built.

These decisions of this court have been followed in *Ex parte Baer* (*D.C.E.D. Ky.*) 25 Fed. (2nd) 912.

Judge Cooley in his excellent work entitled *Cooley's Constitutional Limitations, Eighth Edition, Volume Two,* page 870 expresses the rule thus:

> "There is also a maxim of law regarding judicial action which may have an important bearing upon the constitutional validity of judgments in some cases. No one ought to be a judge in his own cause; and so inflexible and so manifestly just is this rule, that Lord *Coke* has laid it down that 'even an act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself; for *jura naturae sunt immutabilia,* and they are *leges legum.*'"

The bribery of a jury makes a party to litigation the judge of his own cause. Your petitioners were originally denied their day in court by reason of said bribery and they have now been informed by the Courts of Texas that the road to the recovery of their property is forever barred. And by such ruling the Courts of the State of Texas have sanctioned and approved the iniquitous method by which the Continental State Bank of Big Sandy prevailed in this litigation.

No man can say with reason that such a judgment should be allowed to stand. An expression of the broad general principle is found in 16 C. J. S. pages 1272-73 with cases there cited:

> "Due process of law is essential to a valid judgment; and a judgment is void for want of due process where the court * * * renders a judgment * * * without any

judicial determination of the facts which alone can support it."

It is universally held that a judgment may be set aside for fraud. This Court, in the case of *United States v. Throckmorton,* 98 U.S. 61 at 65, speaking through Mr. Justice Miller said:

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; *Pearce v. Olney,* 20 Conn. 544; *Wierich v. De Zoya,* 7 Ill. 385; *Kent v. Ricards,* 3 Md. Ch. 392; *Smith v. Lowry,* 1 Johns. (N. Y.) Ch. 320; *DeLouis et al v. Meek et al.,* 2 Iowa, 55.
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> "In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court."

The courts of Texas have not heretofore ignored this fundamental principle of law. In *Wagley v. Wagley* 230 S.W. 493 at 495, the Court of Civil Appeals said this:

> "The rule is well established that judgment may be set aside by a direct suit brought for that purpose, upon a proper showing of fraud, accident or mistake."

The Court of Civil Appeals again held in *Elder v. Byrd Frost, Inc.*, 110 S.W. (2nd) 172 at 174:

> "It is not to be understood that a trial court is without jurisdiction to entertain a petition or suit, in the nature of a bill of review, based upon sufficient grounds of fraud, accident or mistake, to vacate a judgment rendered at a former term of its court, and relitigate the subject matter, even though the judgment has on appeal been affirmed and thus made the judgment of the appellate court. Accordingly the defendants in the bill of review are not entitled as a matter of law or right to prohibit prosecution of such bill nor will the appellate court issue the writ, except where it is shown that the alleged grounds upon which the bill of review is based are not sufficient to authorize vacation of the judgment attacked. On the other hand, the judgment is res adjudicata of the subsequent suit or bill of review seeking to relitigate the same subject matter, when the grounds alleged are insufficient to authorize vacation of the judgment attacked. Determination of the sufficiency of the alleged grounds upon which the bill of review is based involves consideration of the particular circumstances of the case in which the judgment attacked was rendered. We shall now examine the alleged grounds upon which the bill of review in cause No. 11290-B is based.
>
> "(6, 7) The first ground alleged is that Trip Elder, plaintiff in cause No. 416-B gave a juror $200.00 to either hang the jury in Elder's favor or to by the exercise of the juror's influence upon the other members

of the jury obtain a verdict for Elder. There is no question but that bribery of a juror is fraud sufficient to set aside the verdict of the jury, and to vacate the judgment dependent upon that verdict. But, as shown from the opinion of this court, 92 S.W. 2nd 1134, the judgment here sought to be vacated is not dependent upon the verdict of the jury. It is based upon defendants' failure to establish their only defense, namely, that the deed conveying the land to plaintiff was intended as a mortgage. Elder being entitled to judgment upon the facts as a matter of law, the fraud alleged against him and the juror, if true, would not taint nor impair the judgment rendered, therefore would not constitute a ground for vacating the judgment."

In this case the Continental State Bank of Big Sandy was not entitled to a judgment as a matter of law. On the contrary, the Commission of Appeals of Texas, whose opinion was adopted by the Supreme Court of Texas (114 S.W. (2nd) pages 530-533), specifically based its opinion upholding the judgment upon the findings of the jury. The court said:

"The principal issue in the case was as to the validity of a trustee's sale of the land made April 3, 1928, to Continental State Bank of Big Sandy at a time when the title, subject to the lien, was in Pepper and wife. Two attacks, among others, made by Pepper and wife, and those holding under them, upon the title of Continental State Bank as purchaser at the trustee's sale were: First, that the sale was invalid for failure to comply with certain formalities; and second, that the bank prior to the trustee's sale agreed with Pepper and wife that the sale was to be made, not for the purpose of divesting title, but solely to satisfy a bank examiner with respect to the note, and that thereafter Pepper and wife should retain the land or reacquire title by continuing to make payments to the bank of the amounts

due on the note. *The jury in answer to special issues found that it was not agreed that the sale would be a mere formality for the purpose of satisfying a bank examiner, and that it was agreed that Pepper might reacquire the land by payment of the amount of money due the bank. It further found that Pepper did not make the payments to the bank and that after the trustee's sale he moved off the land and abandoned the intention of making the payments.* The trial court's judgment sustained the validity of the trustee's sale and the bank's unqualified ownership of the land thereunder. That judgment, as has been said, was affirmed by this court. (Emphasis supplied).

"Secondary issues arose out of a controversy between Eggleston, Joines, Anderson and Kaufman, on the one hand, and Floyd and Winans, on the other, as to the ownership under Pepper and wife of the oil, gas, and other mineral rights in the land. Eggleston and his associates claimed under an oil and gas lease and a mineral deed executed by Pepper and wife on March 16 and March 27, 1931. Floyd and Winans claimed under written contract executed August 4, 1931, by which Pepper and wife agreed to lease the land to them for oil and gas and to transfer to them an undivided one-half interest in the oil, gas, and other minerals. Allegations were made that Eggleston perpetrated a fraud upon Pepper in procuring the execution of the oil and gas lease and mineral deed under which he, Joines, Anderson and Kaufman, claimed, and that Floyd and Winans by means of fraudulent representations induced Pepper and wife to execute the contract in their favor for the mineral rights. *The jury's verdict on these secondary issues was favorable to Eggleston and his associates and unfavorable to Floyd and Winans."* (Emphasis supplied).

It is elementary that the scope of a writ of prohibition does not extend beyond the record on which the writ of prohibition is based. The court of Civil Appeals of Texas held,

however, that your petitioners were guilty of laches or negligence in not presenting to the Supreme Court of Texas in the prohibition case the matter of the bribery which was discovered approximately one month after the writ of prohibition had been issued and approximately one week before your petitioners' motion for rehearing in that case was overruled. The expression of the rule is found in 50 C. J. page 662 as follows:

> "In order that a writ of prohibition may issue, there must be some matter actually pending upon which action is threatened; an application prior thereto is premature, *and the writ cannot be used to prevent the institution of an action or prosecution.*" (Emphasis supplied).

That a court will not extend a writ of prohibition to matters outside of the record before it is amply demonstrated in a decision of this Court in *United States v. Hoffman,* 4 Wallace, 158, as follows:

> "The suggestion that there are or may be other cases against the relator of the same character can have no legal force in this case. If they are now pending, and the relator will satisfy the court that they are proper cases for the exercise of the court's authority, it would probably issue writs instead of a rule, but a writ in this case could not restrain the judge in the other cases by its own force, and could affect his action only so far as he might respect the principle on which the court acted in this case. We are not prepared to adopt the rule that we will issue a writ in a case where its issue is not justified, for the sole purpose of establishing a principle to govern other cases."

The Supreme Court of Texas could not consider matters which could not be placed before it under the ac-

cepted principles of law. See 50 C. J. 710 and cases cited, where it is said:

> "For the purpose of determining whether the inferior tribunal has jurisdiction, the court may look to the allegations contained in the motion or petition in the proceeding below, which are presumed to be true, and to the evidence before the inferior court, but it cannot consider issues of fact dehors the record, raised in the superior court by the petition, answer, and accompanying affidavits."

Is it to be wondered at that your petitioners did not present the new matter of the bribery just discovered and attempt to inject it into a record already before the court and upon which a writ of prohibition had already been granted? That writ of prohibition was directed at and restrained the prosecution of your petitioners' bills of review which were then pending. It cannot have any application to a subsequent bill of review setting up different grounds without depriving your petitioners of their Constitutional right to be heard.

In conclusion, your petitioners realize that in the proceedings in the Texas court they have never referred in so many words to the manifest injustice being done them as a denial of "due process". Their protestations, however, against such manifest injustice are part and parcel of the entire proceeding. Perhaps the most vehement protest made by your petitioners is found in their application for rehearing in the Court of Civil Appeals where they said, in referring to the present bill of review:

> "It is not an interference with or hindrance of, but is and seeks the annihilation of said judgment and is and seeks to declare said judgment absolutely void on account of the fraud practiced and

perpetrated by Appellees in obtaining said judgment by bribery of the jurors who tried the case, thus undermining the very ground sill of judicial justice in this Government and fundamental fairness between man and man and the establishment of eternal justice in the courts of our State."

The question of whether or not a Federal question has been properly raised in a State court is in itself a Federal question, to be decided by this Court and this Court alone. That principle of law has been held by this Court in the following cases, among others: *Lovell v. Griffin,* 303 U.S. 444; *Schuylkill Trust Company v. Pennsylvania,* 296 U.S. 113, 121; *Ward v. Love County,* 253, U.S. 17, 22; *Carter v. Texas,* 177 U.S. 442, 447; *Covington and Lexington Turnpike Company v. Sandford,* 164 U.S. 578, 595; *Boyd v. Thayer,* 143 U.S. 135, 180; *Neal v. Delaware,* 103 U.S. 370, 396, 397.

This entire proceeding goes to the heart of the principle of "Due Process." Your petitioners could not have failed to raise the question without abandoning their suit altogether.

Conclusion

Your petitioners submit that the actions of the Texas Courts in taking away their property without their having ever had an opportunity to a fair and impartial trial violates the due process clause of the Fourteenth Amendment to the Constitution of the United States. The relief prayed for should be granted and the decision of the Court of Civil Appeals of Texas at El Paso reversed.

Respectfully submitted,

CRAMPTON HARRIS,
Counsel for Petitioners.

APPENDIX A

Floyd, et al v. Eggleston, et al., 137 S.W. (2nd) 182

WALTHALL, *Justice:*

This suit was brought in the 124th District Court of Gregg County, Texas, by appellants, W. E. Floyd and others (by their intervention), against J. T. Eggleston and others, seeking to set aside a judgment theretofore rendered in said district court on or about March 19, 1932, in cause No. 7709, then pending in said court, and to cancel a certain lease made by D. G. Pepper and wife to said J. T. Eggleston and his assigns, and to cancel a deed made by B. C. Todd, a substitute trustee, to Continental State Bank of Big Sandy, Texas, on April 3, 1928, and to cancel an oil and gas lease made by the said Continental State Bank to Amerada Petroleum Corporation, and to have confirmed a judgment establishing their asserted rights under Pepper and wife, or, in the alternative, damages in the amount stated, and to have confirmed and established their (plaintiffs) title to the 100 acres of land involved in the suit and fully described in the petition, the land situated in Gregg County.

The chief issue of title to the 100 acres of land revolve around the question of the validity of the sale made by the substitute, trustee, Todd.

Eggleston answered appellants' intervention and alleged matters which we need not state, Amerada Petroleum Corporation intervened, claiming its leasehold rights under the Continental State Bank.

For reasons hereinafter shown, it is not our purpose nor is it necessary, to state the many issues of fact and law involved in these suits.

Suit No. 7709, in which appellants intervened, was brought by the Continental State Bank of Big Sandy against D. G. Pepper, et al., and from the judgment rendered an appeal was taken by certain of the defendants. The case reached the Supreme Court and an opin-

ion was rendered by Judge Smedley, of the Commission of Appeals. The issues and the facts are there stated at length and judgment rendered, to which we refer. Continental State Bank of Big Sandy, et al. v. Pepper, et al., 130 Tex. 71, 106 S.W. 2nd 654. A motion for rehearing was overruled, as was application for leave to file a second motion.

Thereafter W. E. Floyd and the heirs of J. E. Winans and Pepper and wife filed a suit in the 124th District Court of Gregg County, being No. 11091-B, against J. T. Eggleston et al. and on October 13, 1937 they filed their first amended petition in said suit.

To that suit appellees here instituted an original proceeding in the Supreme Court by which they sought and obtained a writ of prohibition to prevent Floyd and others from proceeding with the two petitions or bills of review to set aside a judgment for relators, the oil and gas lease, confirm respondents' title to land and recover title to and possession of the land and the value of the oil and gas produced therefrom.

The issues presented and the facts produced in that proceeding and the relief sought by the petition are fully shown in the opinion by Judge Smedley, Commissioner, to which we refer without stating them here. Continental State Bank of Big Sandy et al. vs. Floyd et al., 131 Tex. 388, 114 S.W. 2nd 530, 533.

In that proceeding the Court ordered: "That the writ of prohibition be issued commanding the respondents and each of them to desist from further proceeding with the said petitions filed in Seventy-First district court and the One Hundred Twenty-Fourth district court of Gregg County, Tex., or with said suits, and from further interference with or hinderance of the judgment of this court entered on January 16, 1937, in Continental State Bank of Big Sandy et al. v. D. G. Pepper et al (130 Tex. 71), 106 S.W. 2nd 654."

The opinion was adopted by the Supreme Court. The Court overruled respondents' motions for rehearing.

The trial court in the instant case, on motion of appellees, Continental State Bank of Big Sandy and Amerada Petroleum Corporation, dismissed the case on the ground that "the prosecution of this suit is in conflict with and prohibited by the restraining order and judgment of the Honorable Supreme Court of Texas."

From the above order dismissing the case appellants have perfected an appeal.

Opinion

Appellants have filed herein some ten assignments of error. Appellants have at great length stated the matters at issue in the two cases to which Judge Smedley referred, and cited above, and to which the writ of prohibition was directed, and in their assignments of error make the contention that in neither of the bills of review were there allegations of facts as are contained in the instant case, and for that reason submit that the prosecution of this cause is not in conflict with and prohibited by the restraining order and judgment of the Supreme Court stated above. They submit that the petion and bill of review in this cause are different from those referred to and embraced in the restraining order. Appellants submit that the bill of review in this cause contains allegations of fact sufficient to have the judgment in said cause No. 7709 set aside.

(1) We have concluded that this suit, if prosecuted, whether it states sufficient grounds to set aside the judgment in cause No. 7709, to which it refers, or not, interferes with and is a hindrance of the judgment of the Supreme Court in which the restraining order was issued, referred to above, because it directly involves the relitigation of rights established by said judgment, and is of such nature that, if successfully prosecuted, will result in a judgment which will divest appellees of the right thereby secured. Continental State Bank of Big Sandy v. Floyd, 131 Tex. 388, 114 S.W. 2nd 530; Continental State Bank of Big Sandy, et al., v. Pepper

et al., 130 Tex. 71, 106 S.W. 2nd 654, and cases there referred to.

(2) An injunctive writ issued by the Supreme Court, not void, must be obeyed, according to its terms until and unless modified or vacated by that Court. Herring v. Houston National Exchange Bank, 113 Tex. 337, 255 S.W. 1097; Conley v. Anderson, Tex. Sup. 164 S.W. 985; Ruling Case Law, Vol. 14, page 470, Sect. 170; Corpus Juris, Vol. 32, page 484, Sect. 833.

(3) We concur in appellees' proposition to the effect appellants' motion for rehearing filed in the Supreme Court in the prohibition case was the legal equivalent of a petition by appellants for such modification of terms of the writ issued as would accord appellants the right to attack the judgment in Cause No. 7709 on new facts not theretofore pleaded or discovered; and the action of the Supreme Court in overruling said motion is res judicata of appellants' right to maintain this suit on the ground now urged by them, bribery of jurors, which ground was known to appellants and could and should have been set up by appellants prior to the time the court acted on the motion.

As sustaining the proposition appellees refer to McGhee v. Romatka, 92 Tex. 38, 45 S.W. 552; Waggoner v. Knight, Tex. Com. App., 231, S.W. 357; Freeman v. McAninch, 87 Tex. 132, 27 S.W. 97, 47 Am. St. Rep. 79; 26 Tex. Jur., beginning on page 136, and extending through several paragraphs, the general rule that claims or demands that rights have been adjudicated is stated and discussed.

(4) We think also that the judgment of the trial court in dismissing the case was not error, as the record shows that appellants had failed to prosecute their bill of review with diligence. It appears from the record that the judgment complained of was rendered March 19, 1932; appellants' motion for new trial was overruled March 25, 1932; their first bill of review in cause No. 2112-B was filed August 5, 1933, and was dismissed

February 1, 1934; their second bill of review in cause No. 8820-A was filed October 18, 1933, and was pending undisposed of on April 28, 1938; their third bill of review in Cause No. 11091-B, in the 124th District Court was filed October 13, 1937, and was likewise pending undisposed of on April 28, 1938, when it was dismissed by the 124th District Court. The allegation of bribery is charged to have occurred more than six years before it was alleged to have been discovered, about April 21, 1938.

(5) Proceedings to set aside a final judgment after the term are equitable proceedings, jealously watched and granted only in extreme and restricted cases. The general rules and grounds for relief are stated and discussed in 25 Tex. Jur., beginning on page 597, and the many cases referred to in the notes, to which we refer without stating them here.

The issues and the facts pertaining thereto have been fully stated by Judge Smedley in the two cases to which we have referred.

The case is affirmed.

APPENDIX B

In the Supreme Court of Texas

January 3, 1940

W. E. FLOYD, ET AL,
App. No. 24620. *vs.* (From Gregg County, Eighth District)
J. T. EGGLESTON, ET AL.

This day came on to be heard the application of plaintiffs in error for a writ of error to the Court of Civil Appeals for the Eighth District and the same having been duly considered, it is ordered that the application be refused; that the applicants, W. E. Floyd, et al, (named as appellants in the Court of Civil Appeals), and sureties, W. Daniel and Orion A. Daniel, pay all costs incurred on this application.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 112

W. E. FLOYD, ET AL

vs.

J. T. EGGLESTON, ET AL

Reply to Petition for Writ of Certiorari

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STATUTE:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 112

W. E. FLOYD, ET AL

vs.

J. T. EGGLESTON, ET AL

Reply to Petition for Writ of Certiorari

May It Please the Court:

Respondents Continental State Bank of Big Sandy and Amerada Petroleum Corporation respectfully present this, their joint reply to the petition for certiorari, and urge that said petition be denied because:

1. No substantial federal question exists in the case.

2. No federal question was set up in the state court; nor was any such question noticed or decided by the court below.

3. The decision of the State Court of Civil Appeals, affirming the order of dismissal entered by the district court, was based upon independent and adequate non-federal grounds, involving questions of local practice and general principles of law.

Since the record has not been printed, and the typewritten copy on file is not available to respondents, the discussion herein will be based for the most part on statements appearing in the reported opinions of the state courts in this and companion cases, and in the printed petition for certiorari.

PRELIMINARY STATEMENT

Respondents believe that a brief statement with reference to the origin and development of the main title suit will lead to a clearer understanding of the published opinions therein, especially since petitioners did not participate in the original appeal and are not referred to in those opinions.

Respondent Bank originally owned the land in controversy and sold it to D. G. Pepper in 1926, taking a deferred payment note without any "cash down" payment. The foreclosure sale was made two years later, in April, 1928, and the bank became the purchaser thereat. In 1931, shortly after the discovery of oil in East Texas, the bank executed a mineral lease to respondent, Amerada Petroleum Corporation. About the same time, Pepper asserted title (claiming that the foreclosure sale was void for various reasons), and he executed a lease and royalty conveyance to one J. T. Eggleston. The original title suit, No. 7709 in the district court, was commenced in the spring of 1931, between Pepper and Eggleston on one side and these respondents on the other. In September, 1931, Eggleston transferred his lease to Joines, Anderson and Kaufman, and they intervened in the

pending suit. *D. G. Pepper v. Continental State Bank of Big Sandy, et al,* 60 S. W. (2d) 1089; *Continental State Bank of Big Sandy v. D. G. Pepper, et al,* 130 Tex. 71, 106 S. W. (2d) 654.

It appears from the allegations of petitioners' bill in the instant suit (No. 12,410-B), particularly paragraph IX thereof, that in August, 1931, petitioner, W. E. Floyd, and one J. E. Winans, under whom the other petitioners herein claim, "called on" Pepper and "explained" to him that he had been over-reached and defrauded by Eggleston, and that at such time a contract was made which provided in substance that Floyd and Winans should "clear the title" not only of the claims of these respondents but also of the claims of Eggleston and his assigns, and in consideration thereof Floyd and Winans were to receive from Pepper a lease and 1/2 interest in the royalty rights. It is alleged that the contract was placed in escrow "to be delivered to said W. E. Floyd and J. E. Winans upon performance of their part of said contract." (Bill, paragraph IX.)

Floyd and Winans subsequently became parties to Cause No. 7709, before the trial thereof, and they therein asserted the rights claimed under the above mentioned contract with Pepper, and asserted title on behalf of themselves and D. G. Pepper as against all other parties to the suit.

Pepper and Eggleston attacked the Floyd and Winans contract on the ground that it had been procured from Pepper by means of false and fraudulent misrepresentations. This raised the "secondary is-

sue" in the case in which, obviously, these respondents were not interested because it could make no difference to them whether Floyd and Winans, or Eggleston, had the better right under Pepper.

On the trial, Floyd and Winans were found guilty of fraud as charged, and their contract was cancelled by the terms of the judgment, but judgment on the main issue of title was rendered in favor of these respondents as against Pepper and all parties claiming under him. Floyd and Winans did not appeal from that judgment, but Pepper, Eggleston, Joines, Anderson and Kaufman did and the case was hotly contested on the merits through the state courts until June 16, 1937, when the judgment of the trial court was affirmed by the Supreme Court of Texas. See opinions above referred to. In the meantime, however, Floyd and Winans filed "several bills of review," one of which was dismissed voluntarily and two of which were dismissed in obedience to the writ of prohibition.

Without obtaining leave of the Supreme Court of Texas, petitioners, on June 23, 1938, filed this suit in the district court of Gregg County, to set aside the judgment theretofore rendered by said court in Cause No. 7709, which judgment had been affirmed by and made the judgment of the Supreme Court. *Continental State Bank of Big Sandy v. Pepper*, 130 Tex. 71, 106 S. W. (2d) 654. Not only had respondents failed to obtain leave from the Supreme Court of Texas to proceed in the premises, but they filed this suit in the face of an injunction theretofore issued against them by said Court in connection with

the similar suits previously filed (though on other alleged grounds of fraud) commanding petitioners to desist "from further interference with or hindrance of the judgment" attacked. *Continental State Bank of Big Sandy, et al, v. Floyd, et al,* 131 Tex. 388, 114 S. W. (2d) 530. In its opinion in the last mentioned case, referred to herein as the prohibition case, the court said:

> "The settled rule as to the authority of the Supreme Court to issue the writ of prohibition was clearly stated by Judge Harvey in Houston Oil Company of Texas v. Village Mills Company, 123 Tex. 253, 259, 71 S. W. (2d) 1087, 1089. He said: 'Where rights are established by a judgment of this court, the court has undoubted power to secure, by any proper writ necessary to the end, *the enjoyment of the rights so established.* Where a suit is brought in an inferior court, by any of the parties or privies to such judgment, against those in favor of whom the judgment was rendered, or their privies, and the suit directly involves the relitigation of rights established by the judgment, and is of such nature that, if successfully prosecuted, will result in a judgment which will purport the divesting of those rights, the prosecution of such suit will be prohibited as being *an interference* with the enforcement of the judgment of this court.'
>
> "See, also, Hovey v. Shepherd, 105 Tex. 237, 147 S. W. 224; Rio Bravo Oil Company v. Hebert, Tex. Sup., 106 S. W. (2d) 242.
>
> "Applying the foregoing rule to the facts of the instant case as above stated, we find that the suits which have been brought in the district courts of Gregg County, by the filing of petitions

somewhat in the nature of bills of review, are by the parties, and privies of the parties, to the judgment rendered in the district court of Gregg County (which judgment by its affirmance here became the judgment of this court) against those, and their privies in favor of whom that judgment was rendered, and that the two suits directly involve the relitigation of the principal and controlling issue in that case and of the rights established by that judgment; namely, the validity of the trustee's sale of the land to Continental State Bank of Big Sandy and the rights of the bank, and those who acquired interests in the land from it, *to hold and maintain their title and interests so acquired against the attacks and claims of Pepper and wife and those claiming under them.*" (114 S. W. (2d) 532-33) (Italics ours.)

* * * * *

"It is ordered that the writ of prohibition be issued commanding the respondents and each of them to desist from further proceeding with the said petitions filed in the Seventy-First district court and the One Hundred Twenty-Fourth district court of Gregg County, Tex., or with said suits, *and from further interference with or hindrance of the judgment of this court entered on January (June) 16, 1937, in Continental State Bank of Big Sandy,* et al v. *D. G. Pepper,* et al, 106 S. W. (2d) 654." 114 S. W. (2d) 533.

Upon the filing of the instant suit, these respondents presented to the trial court their motion to dismiss on two grounds, viz: (1) that the filing of the suit was, and the prosecution thereof necessarily would be, in direct conflict with and in disobedience of the restraining order and writ of prohibition issued

by the Supreme Court of Texas, and (2) that petitioners had not prosecuted their suit with required diligence. The motion was granted, and the order dismissing the case was affirmed by the Court of Civil Appeals at El Paso. *Floyd, et al v. Eggleston, et al,* 137 S. W. (2d) 182. Motion for rehearing was overruled by said Court of Civil Appeals without written opinion, and application for writ of error was denied by the Supreme Court of Texas, also without written opinion.

I.

NO SUBSTANTIAL FEDERAL QUESTION IS INVOLVED

Dismissal of the case by the district court did not constitute a denial of "fundamental justice," or due process of law, within the meaning of the Constitution, because petitioners had undertaken to proceed without leave of the Supreme Court of Texas, which court had theretofore affirmed and made its own the judgment attacked. We understand the rule recognized by this Court to be as stated in *Obear-Nester Glass Co. v. Hartford-Empire Co.* (8th Cir.), 61 Fed. (2d) 31, 34, viz:

> "Where there has been no appeal, the defeated party may, in a proper case, and within proper time, on leave of that court first had and obtained, file in the trial court a bill of review. Where, however, the decree of the trial court has been appealed from and has been disposed of by the appellate court, either by affirmance or reversal, then the trial court may not entertain a

bill of review, nor permit it to be filed without leave first granted by the appellate court, because after decision by the appellate court, the decree of the lower court becomes the decree of the appellate court. The application for leave to file the bill of review in the instant case is, therefore, properly presented to this court. In re Potts, 166 U. S. 263, 17 S. Ct. 520, 41 L. Ed. 994; National Brake & Electric Co. v. Christensen, 254 U. S. 425, 41 S. Ct. 154, 156, 65 L. Ed. 341; Simmons Co. v. Grier Bros. Co., 258 U. S. 82, 42 S. Ct. 196, 66 L. Ed. 475; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399, 43 S. Ct. 458, 67 L. Ed. 719; Hagerott v. Adams, 61 F. (2d) 35; Omaha Electric Light & Power Co. v. City of Omaha (C. C. A.), 216 F. 848; Society of Shakers v. Watson (C. C. A.), 77 F. 512; Suhor v. Gooch (C. C. A.), 248 F. 870. The application is addressed to the discretion of the court and is not to be granted as a matter of course."

II.

THE FEDERAL QUESTION NOW RELIED UPON WAS NOT SET UP IN THE STATE COURT

Petitioners concede that they did not, "in so many words," set up a federal question in the state court, but they assert (petition, p. 7) that the question of due process was raised by their "protestations against the fundamental injustice of allowing the said writ of prohibition to extend beyond the matters on which it was based." The only "protest" of this sort to which we are referred by petitioners (petition, pp. 22-23) is a sentence taken from an argument subjoined to

their motion for rehearing filed in the Court of Civil Appeals, which motion, as hereinabove stated, was overruled without written opinion.

The making of an argument that the instant suit does not constitute "interference with" the former judgment, or, if so, that the writ issued should be given no application because of the new ground of attack never before set up, was not sufficient to call to the attention of the court below the fact, if it be a fact, that petitioners were attempting to invoke the due process clause of the 14th Amendment.

The authorities cited by petitioners in support of the jurisdiction of this Court (p. 11) do not sustain them. In *Tumey v. Ohio* and *Truax v. Corrigan*, the federal question was specifically and "in so many words" set up in the court of first instance; and in *Ex Parte Baer*, the question involved related to the authority of a United States district court to issue a writ of habeas corpus under Sections 751-755, and 761, U. S. Revised Statutes (Comp. St., Secs. 1279-1283, 1289).

It is essential that the federal right claimed must have been specially set up in the state court.

28 U. S. C. A., Sec. 344(b);
Harding v. Illinois, 196 U. S. 78, 49 L. Ed. 394, 25 Sup. Ct. 176;
Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, 17 Sup. Ct. 1003;
American Surety Co. v. Baldwin, 287 U. S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231.

And the federal question comes too late where raised for the first time in a motion for rehearing filed in the state court, if the motion is overruled without discussion.

Corkran Oil and Development Co. v. Arnaudet, 199 U. S. 182, 50 L. Ed. 143, 149, 26 Sup. Ct. 41;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.

III.

THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT NON-FEDERAL GROUNDS ADEQUATE TO SUPPORT IT

(a) The Court of Civil Appeals held that this suit constitutes interference with the judgment attacked and that the injunctive writ issued by the Texas Supreme Court, prohibiting such interference, must be obeyed according to its terms until modified or vacated by that court. 137 S. W. (2d) 184. In so holding, the court followed literally the definition of the term "interference" as laid down by the State Supreme Court in the prohibition case (hereinabove copied, p. 5) and applied the generally accepted rule that an injunctive or restraining order issued by a court having jurisdiction of the parties and subject matter must be obeyed until vacated or modified by the court awarding it, or until the order or decree awarding it has been reversed on appeal or error. The authorities cited amply support the holding.

Herring v. Houston Natl. Exch. Bank, 113 Tex. 7, 255 S. W. 1097;
Conley v. Anderson (Tex. Sup.), 164 S. W. 985;
Ex Parte Kimberlin (Tex. Sup.), 86 S. W. (2d) 717, 721;
14 R. C. L. 470, Sec. 170;
32 Corpus Juris, 484, Sec. 833.

Obviously, petitioners' remedy was to apply to the Texas Supreme Court for such modification of the terms of the writ issued as would accord them the right to make another attack on the judgment in question on the "newly discovered" ground of bribery of two of the jurors. In *Herring v. Houston Natl. Exch. Bank*, supra, under similar circumstances, the Supreme Court of Texas said:

> "That this court had the jurisdiction and power to enter such judgment we have no doubt, and likewise that the act of securing the issuance of said writ of garnishment was a violation thereof. *If the terms of the order of injunction were broader and more far-reaching than respondents thought they should be, their remedy was by prayer for modification in motion for rehearing.*" (255 S. W. 1102) (Italics ours).

In their discussion of the "scope" of a writ of prohibition generally (Brief, pp. 20-21) petitioners ignore the essential difference between a writ issued to prevent a lower court from assuming to exercise a nonexistent jurisdiction and a writ directed to the parties restraining them from further interference with

rights established by a previous judgment of the higher court. The latter is an injunction binding upon the parties thereto in terms as framed by the court, so long as the same remains in effect.

(b) The Court of Civil Appeals also held that the doctrine of res judicata was applicable to petitioners' asserted right to attack the judgment on the alleged ground of bribery of two jurors. That holding is based on the following fact situation: The writ of prohibition was issued March 23, 1938, in general terms not only preventing further proceedings in the pending actions but broad enough to inhibit "further interference" by petitioners with the former judgment *on any ground.* On April 7, 1938, petitioners filed a motion for rehearing which the Court of Civil Appeals held to be "the legal equivalent of a petition by appellants (petitioners here) for such modification of the terms of the writ issued as would accord appellants the right to attack the judgment in Cause No. 7709 on new facts not theretofore pleaded or discovered." Presumably that motion is shown in the record now before this Court. It is copied in the appendix hereto, marked Exhibit "A". In such motion petitioners did not contend that the writ had been erroneously issued but they alleged that since the filing of their pending suits they had discovered "new and additional facts" establishing fraud on the part of the Continental State Bank (other than bribery of jurors), and they affirmatively prayed that they be given leave and opportunity to prepare an amended petition setting up such new facts, and of submitting same to the Supreme Court for its inspection, and that

they thereafter be permitted to file and prosecute such amended petition in the district court.* The new facts, but meagerly set out in the motion, were obviously insufficient to justify further litigation in the premises; but by the motion petitioners raised the issue of their right to proceed on grounds not theretofore known to or pleaded by them, and it was incumbent upon them to support their contention by every material fact then known to them or which might become available to them during the course of the proceeding.

The Supreme Court of Texas held the motion for rehearing under consideration until April 27, 1938, when it was overruled. It now appears, by allegation in the instant bill and statement in the petition for certiorari herein, page 13, that petitioners "discovered" the alleged bribery of two jurors on April 21, 1938. There was nothing to prevent the presentation of the facts concerning such alleged bribery to the court before it acted on the motion, by amended or supplemental motion. Indeed, it could have been done by a second motion for rehearing within a reasonable time after the overruling of the first. But petitioners took no action of that sort. Nor have they made any direct attack on the judgment in the prohibition case, by appeal to this court or otherwise. They simply ignored the injunction and filed another suit in the district court. The principle of law involved, widely

*The motion for rehearing was filed in the name of petitioner W. E. Floyd alone, but petitioners here state that "on April 7, 1938, your petitioners filed a motion for rehearing" in the prohibition case. (Petition, p. 13.)

recognized, is that a party may not litigate matters which he might have interposed, but did not, in a prior action between the same parties or their privies in reference to the same subject matter. The rule was stated by this court in *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. ....., as follows:

> "The remaining question is simply whether respondents having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' Grubb v. Public Utilities Commission, 281 U. S. 470, 74 L. ed. 972, 50 S. Ct. 374, supra; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195, supra."

See also *Freeman v. McAninch*, 87 Tex. 132, 27 S. W. 97, 47 Am. St. Rep. 79; *McGhee v. Romatka*, 92 Tex. 38, 45 S. W. 552; *Waggoner v. Knight* (Tex. Com. App.), 231 S. W. 357; *Roy v. Scales* (Ind. App.), 132 N. E. 268; *Klinkert v. Streissguth*, 155 Minn. 388, 193 N. W. 687; and *Nuzzi v. United States Casualty Co.*, 121 N. J. L. 249, 1 Atl. (2d) 890.

The proposition now being pressed by petitioners is that they have the right to attack the judgment on

grounds not set up in their former suits, or known to them when those suits were filed. They urged the same proposition in the Texas Supreme Court, in another action, at a time when they knew as much about the alleged bribery of jurors as they know now, and it was ruled against them.

Petitioners, at least, should have given the Texas Supreme Court an opportunity to pass upon their allegations of bribery and, if same were found sufficient, to modify the broad terms of its injunction in such manner as to permit another attack on that ground.

(c) The Court of Civil Appeals further held that the order of dismissal was justifiable on the ground "that appellants had failed to prosecute their bill of review with diligence." An examination of this holding would involve a review of the testimony taken at the hearing on the motion to dismiss. We may state only a few of the significant facts appearing in this record.

The original judgment was entered by the district court in favor of these respondents on March 19, 1932, but the same was reversed by the Court of Civil Appeals at Texarkana on May 25, 1933, insofar as it denied recovery to Eggleston, Joines, Anderson and Kaufman, and judgment was rendered in favor of said last named parties for the mineral interests claimed by them, which constituted the chief value of the land. *Pepper, et al, v. Continental State Bank of Big Sandy, et al*, 60 S. W. (2d) 1089. The decision of the Texas Supreme Court, reversing the

Court of Civil Appeals and affirming the trial court was entered on June 16, 1937. So for a period of a little more than four years it appeared that Eggleston, Joines, Anderson and Kaufman were the victors in the litigation. In three bills filed during that time petitioners charged various acts of alleged fraud to Eggleston, Joines, Anderson and Kaufman, without in any wise implicating these respondents or either of them. It was only after the decision by the Supreme Court in favor of these respondents that fraud was charged to them, first in an amended bill filed in Cause No. 11,091-B on October 3, 1937, again in the motion for rehearing filed in the prohibition case on April 7, 1938, and finally in the instant bill filed June 23, 1938.

In the instant bill, the bribery of jurors is alleged to have been discovered on April 21, 1938. The bill itself was verified by petitioner Floyd on May 26, 1938, but it was not filed with the clerk until June 23, 1938.

At the hearing on motion to dismiss, held September 9, 1938, it was shown that when the suit was filed, the clerk was requested by petitioner Floyd to issue process for only three of the many defendants, to-wit, these two respondents and the Stanolind Oil and Gas Company, which operated the pipe line running oil from the premises. No other process had been issued nor had any of the other defendants been brought before the court by the date of the hearing. Petitioner Floyd was orally examined. He first testified that he had waivers of process signed by all of the other defendants except D. G. Pepper. Asked where such

waivers were, he replied: "That's my business." He was finally compelled to admit that he had no waivers. Asked why he had not filed the suit sooner after having sworn to the bill, he replied: "It wasn't handy." There was no further explanation. There was no showing by way of allegation in the bill or testimony taken at the hearing with reference to the circumstances under which the alleged bribery of jurors was discovered—more than six years after the trial—or why the same was not or could not have been discovered sooner.

A suit to set aside a judgment for fraud in the procurement is an equitable action, and it is required that the complaining party move with diligence and in good faith.

It has been repeatedly held that this Court will not undertake to review the judgment of a state court which is put upon a non-federal ground adequate to sustain it. *Fox Film Corp. v. Muller*, 296 U. S. 207, 80 L. Ed. 158; *S. W. Bell Telephone Co. v. Oklahoma*, 303 U. S. 206, 58 Sup. Ct. 528, 82 L. Ed. 751; *McCoy v. Shaw*, 275 U. S. 515, 72 L. Ed. 891; *Bilby v. Stewart*, 246 U. S. 255, 62 L. Ed. 701.

There was no federal question raised in the court below; but even if petitioners had there expressly invoked the due process clause of the Fourteenth Amendment, it cannot be said, in our opinion, that the non-federal grounds of the decision are so plainly unfounded that they may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question.

CONCLUSION

For the reasons herein discussed, Respondents respectfully pray that the petition for certiorari be in all things denied.

Respectfully submitted,

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APPENDIX

"EXHIBIT A"

No. 1767-7361

IN THE SUPREME COURT OF TEXAS

CONTINENTAL STATE BANK OF BIG SANDY, ET AL,

vs.

W. E. FLOYD, ET AL

MOTION FOR REHEARING

To The Honorable Supreme Court of Texas:

COMES NOW the respondent, W. E. Floyd, and moves this Honorable Court to set aside its former ruling and opinion made and rendered herein on the 23rd day of March, A. D., 1938, and grant this respondent a rehearing herein and upon a rehearing and a reconsideration of the matters involved herein that this Honorable Court grant this respondent an order and decree in all things refusing the Writ of Prohibition applied for herein by the relators and for cause says:

The Writ of Prohibition directed by the judgment of this Honorable Court to be issued in this cause commands the respondents and each of them to desist and refrain from further prosecuting and proceed-

ings with petitions filed in the 71st and 124th District Courts of Gregg County, Texas, involving the subject-matter of this controversy.

The principal reason as recited in the opinion of this Honorable Court sustaining the relator's right to a writ of prohibition as against all respondents is the fact that there is no allegation in the petition filed in the 124th District Court of Gregg County, Texas, to the effect that in the original trial in the District Court of Gregg County, Texas, the issue as to the sale under the deed of trust by virtue of which the Continental State Bank of Big Sandy acquired title to the premises in controversy was not fairly presented and fairly tried.

This respondent says that at the time the petition for a bill of review was filed in the 124th District Court of Gregg County, Texas, he was not fully informed as to all of the facts surrounding and leading up to the sale of the properties involved herein, under the deed of trust, by virtue of which sale the said Continental State Bank of Big Sandy acquired its purported title to said lands. That since the filing of said petition for bill of review in the Honorable 124th District Court of Gregg County, Texas, this respondent has discovered new and additional evidence which this respondent verily believes if properly and fairly presented to a court of competent jurisdiction would lead to a verdict in favor of this respondent and that it can be shown and if this respondent is permitted to proceed with the trial in the 124th District Court of Gregg County, Texas, he will ask for and obtain leave to file a first amended orig-

inal petition in said court in which he will set up the new and additional facts which have been discovered since the filing of the original petition in said 124th District Court, and that if permitted to proceed to trial on said first amended original petition, this respondent verily believes he will obtain a judgment as against the Continental State Bank of Big Sandy recovering as against said bank the rights asserted in his petition. That the facts now known to this respondent which would have the effect, as this respondent believes, of invalidating the trustee's sale by virtue of which said Bank acquired its purported title were not known to respondent at the time of filing of the original petition for bill of review in the 124th District Court of Gregg County, Texas. That this respondent will be able to prove, if permitted to try said cause in the 124th District Court of Gregg County, Texas, that the said Continental State Bank of Big Sandy was guilty of such bad faith and fraud in proceeding with the sale of said property under deed of trust and in asserting title as against this respondent that would have the effect of entirely invalidating the purported title of the Continental State Bank of Big Sandy, and that the ends of justice would be served by permitting this respondent to litigate his rights in said suit, in presenting such additional and newly discovered evidence as is now in his possession.

WHEREFORE, this respondent prays that this Honorable Court grant him a rehearing in this cause; that he be allowed to file herein an amended motion containing a copy of his first amended original petition to be filed in the 124th District Court of Gregg County, Texas, and that this Honorable Court consider the same, and upon a full consideration of the same the Writ of Prohibition herein prayed for by the relators be in all things denied.

Respectfully submitted,

Wheeler Felts & Wheeler
Attorneys for Respondent,
W. E. Floyd